Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

NIXON, ATTORNEY GENERAL OF MISSOURI *v.* MISSOURI MUNICIPAL LEAGUE ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02–1238. Argued January 12, 2004—Decided March 24, 2004*

After Missouri enacted a statute forbidding its "political subdivision[s to] provide or offer for sale . . . a telecommunications service or . . . facility," the municipal respondents, including municipally owned utilities, petitioned the Federal Communications Commission (FCC) for an order declaring the statute unlawful under 47 U. S. C. §253, which authorizes preemption of state and local laws and regulations "that prohibit or have the effect of prohibiting the ability of any entity" to provide telecommunications services. Relying on its earlier order resolving a challenge to a comparable Texas law and the affirming opinion of the District of Columbia Circuit, the FCC refused to declare the Missouri statute preempted, concluding that "any entity" in §253(a) does not include state political subdivisions, but applies only to independent entities subject to state regulation. The FCC also adverted to the principle of *Gregory* v. *Ashcroft*, 501 U. S. 452, that Congress needs to be clear before it constrains traditional state authority to order its government. The Eighth Circuit panel unanimously reversed, explaining that §253(a)'s word "entity," especially when modified by "any," manifested sufficiently clear congressional attention to governmental entities to get past *Gregory*.

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*Together with No. 02–1386, *Federal Communications Commission et al.* v. *Missouri Municipal League et al.*, and No. 02–1405, *Southwestern Bell Telephone, L. P., fka Southwestern Bell Telephone Co.* v. *Missouri Municipal League et al.,* also on certiorari to the same court.

Syllabus

Held: The class of entities contemplated by §253 does not include the State's own subdivisions, so as to affect the power of States and localities to restrict their own (or their political inferiors') delivery of telecommunications services. Pp. 4–14.

(a) Two considerations fall short of supporting the municipal respondents. First, they argue that fencing governmental entities out of the telecommunications business flouts the public interest in promoting competition. It does not follow, however, that preempting state or local barriers to governmental entry into the market would be an effective way to draw municipalities into the business, and in any event the issue here does not turn on the merits of municipal telecommunications services. Second, concentrating on the undefined statutory phrase "any entity" does not produce a persuasive answer here. While an "entity" can be either public or private, there is no convention of omitting the modifiers "public and private" when both are meant to be covered. Nor is coverage of public entities reliably signaled by speaking of "any" entity; "any" can and does mean different things depending upon the setting. To get at Congress's understanding requires a broader frame of reference, and in this litigation it helps to ask how Congress could have envisioned the preemption clause actually working if the FCC applied it at the municipal respondents' urging. See, *e.g.*, *New Jersey Realty Title Ins. Co.* v. *Division of Tax Appeals of N. J.*, 338 U. S. 665, 673. The strange and indeterminate results of using federal preemption to free public entities from state or local limitations is the key to understanding that Congress used "any entity" with a limited reference to any private entity. Pp. 4–6.

(b) The municipal respondents' position holds sufficient promise of futility and uncertainty to keep this Court from accepting it. Pp. 6–13.

(1) In familiar instances of regulatory preemption under the Supremacy Clause, a federal measure preempting state regulation of economic conduct by a private party simply leaves that party free to do anything it chooses consistent with the prevailing federal law. See, *e.g.*, *Lorillard Tobacco Co.* v. *Reilly*, 533 U. S. 525, 540–553. But no such simple result would follow from federal preemption meant to unshackle local governments from entrepreneurial limitations. Such a government's capacity to enter an economic market turns not only on the effect of straightforward economic regulation below the national level (including outright bans), but on the authority and potential will of state or local governments to support entry into the market. Preempting a ban on government utilities would not accomplish much if the government could not point to some law authorizing it to run a utility in the first place. And preemption would make no dif-

ference to anyone if the state regulator were left with control over funding needed for any utility operation and declined to pay for it. In other words, when a government regulates itself (or the subdivision through which it acts) there is no clear distinction between the regulator and the entity regulated. Legal limits on what the government itself (including its subdivisions) may do will often be indistinguishable from choices that express what the government wishes to do with the authority and resources it can command. Thus, preempting state or local governmental self-regulation (or regulation of political inferiors) would work so differently from preempting regulation of private players that it is highly unlikely that Congress intended to set off on such uncertain adventures. Pp. 6–7.

(2) Several hypothetical examples illustrate the implausibility of the municipal respondents' reading that Congress intended §253 to preempt state or local governmental self-regulation. Whether a law prohibiting an entity's "ability" to provide telecommunications under §253 means denying the entity a capacity or authority to act in the first place, or whether it means limiting or cutting back on some preexisting authority to go into the telecommunications business (under a different law), the hypotheticals demonstrate that §253 would not work like a normal preemptive statute if it applied to a governmental unit. It would often accomplish nothing, it would treat States differently depending on the formal structures of their laws authorizing municipalities to function, and it would hold out no promise of a national consistency. That Congress meant §253 to start down such a road in the absence of any clearer signal than the phrase "ability of any entity" is farfetched. See, *e.g.*, *United States* v. *American Trucking Assns., Inc.*, 310 U. S. 534, 543. Pp. 7–12.

(3) The practical implication of the dissent's reading of §253 to forbid States to withdraw municipalities' preexisting authority expressly to enter the telecommunications business, but not withdrawals of authority that are competitively neutral in the sense of being couched in general terms that do not expressly target telecommunications, is to read out of §253 the words "or has the effect of prohibiting." Those words signal Congress' willingness to preempt laws that produce the unwanted effect, even if they do not advertise their prohibitory agenda on their faces. The dissent's reading therefore disregards §253's plain language and entails a policy consequence that Congress could not possibly have intended. Pp. 12–13.

(c) A complementary principle would bring the Court to the same conclusion even on the assumption that preemption might operate straightforwardly to provide local choice. Section 253(a) is hardly forthright enough to pass *Gregory:* "ability of any entity" is not limited to one reading, and neither statutory structure nor legislative

Syllabus

history points unequivocally to a commitment by Congress to treat governmental telecommunications providers on par with private firms. The want of any "unmistakably clear" statement to that effect, 501 U. S., at 460, would be fatal to respondents' reading. Pp. 13–14.

299 F. 3d 949, reversed.

SOUTER, J., delivered the opinion of the Court, in which REHNQUIST, C. J., and O'CONNOR, KENNEDY, GINSBURG, and BREYER, JJ., joined. SCALIA, J., filed an opinion concurring in the judgment, in which THOMAS, J., joined. STEVENS, J., filed a dissenting opinion.